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No. 06-1209

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In The Supreme Court of the United States

JOHN WASHINGTON HIGHTOWER,

Petitioner,

v.

WILLIAM TERRY, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR REHEARING

OF COUNSEL:
MARK E. OLIVE
LAW OFFICES OF MARK E. OLIVE
320 West Jefferson Street
Tallahassee, Florida 32301
(850) 224-0004

JEFFREY L. ERTEL
FEDERAL DEFENDER PROGRAM, INC.
100 Peachtree Street, N.W.
Suite 200
Atlanta, Georgia 30303
(404) 688-7530

MARK L. WHITAKER
Counsel of Record
HOWREY LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800

Counsel for Petitioner
John Washington Hightower

Table of Contents

I. THE ELEVENTH CIRCUIT'S OPINION IN *UNITED STATES V. EDOUARD* 1

II. THE LOWER COURT IMPROPERLY CONDENSED STEPS TWO AND THREE OF THIS COURT'S MANDATED THREE-STEP *BATSON* INQUIRY 3

III. CONCLUSION 7

Table of Authorities

Atwater v. Crosby, 451 F.3d 799 (11th Cir. 2006).....3

Batson v. Kentucky, 476 U.S. 79 (1986).....4

Hightower v. Terry, 459 F.3d 1067 (11th Cir. 2006).....4-6

Miller-El v. Dretke, 545 U.S. 231 (2005) 3-4

Norris v. Alabama, 294 U.S. 587 (1935) 4

United States v. Edouard, No. 05-15808, 2007 U.S. App. LEXIS 11117 (11th Cir. May 11, 2007) 1-3

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR REHEARING

Petitioner John Washington Hightower respectfully moves this Court for an Order (1) vacating its denial of the petition for writ of certiorari, entered on May 14, 2007, and (2) granting the petition. As grounds for this motion, petitioner states the following:

I. THE ELEVENTH CIRCUIT'S OPINION IN *UNITED STATES V. EDOUARD*

On May 11, 2007, after petitioner's submission of his petition for writ of certiorari and only three days before the Court denied that petition, the Eleventh Circuit issued its decision in *United States v. Edouard*, No. 05-15808, 2007 U.S. App. LEXIS 11117 (11th Cir. May 11, 2007), in which it discussed the application of *Batson*'s three-step analysis. *Id.* at *30-*37.

As in the instant case, the defendant in *Edouard* raised Batson objections to the prosecutor's use of peremptory strikes to remove nonwhite venirepersons from the jury. *Id.* at *32-*33. To support the peremptory striking of four black venirepersons, the prosecutor explained that he struck the first because her "English could be an issue," the second "because the man was wearing sunglasses and it was therefore difficult to determine his reactions to certain questions," the third because "she was unemployed and it was very difficult to understand her answers to questions," and the fourth because, *inter alia*, "she answered the questions very quickly" and neither the prosecutor nor his co-counsel were "able to write down anything she had to say." *Id.* at *33-*34.

The court concluded that the prosecution's first strike was made for a "race neutral reason" and that the fourth strike was made for a "strategic reason." *Id.* The court, however, summarily overruled the defendant's objections for the second and third strikes. *Id.* And at no point did the court consider whether the defendant "had refuted the race neutral explanations proffered by the Government." *Id.* at *35.

The Eleventh Circuit concluded that "the district court improperly condensed the second and third steps of the Batson inquiry by summarily overruling Edouard's objections and/or failing to consider whether Edouard had refuted the race-neutral explanations proffered by the Government." *Id.* at *35. The court added that "'the failure to address each of Batson's steps creates the risk of serious constitutional error.'" *Id.* (quoting *Atwater v. Crosby*, 451 F.3d 799, 807 (11th Cir. 2006)).

The Eleventh Circuit's criticism of the district court's condensation of the second and third steps of the Batson inquiry stand in direct contrast to the similar condensation the Eleventh Circuit ratified in the instant case and thus justifies reconsideration of the denial of certiorari.

II. THE LOWER COURT IMPROPERLY CONDENSED STEPS TWO AND THREE OF THIS COURT'S MANDATED THREE-STEP *BATSON* INQUIRY

The Eleventh Circuit now recognizes that the petitioner was entitled, as a matter of due process, to have a full and complete *Batson* analysis of the State's exercise of peremptory strikes against non-white venire members. The Eleventh Circuit, however, has not upheld that right in the instant case.

Here, neither the trial court judge, nor the Georgia Supreme Court, expressly "assess[ed] the plausibility" of the prosecutor's stated reasons for any of his six strikes removing African-Americans from service on Petitioner's capital jury, as required by *Batson*. With respect to each of the prosecutor's stated reasons, the trial court judge simply responded: "the State has stated an articulable reason for striking [juror - fill in the blank] and the reason is not race related." This Court stated in *Miller-El II* that a prosecutor's "facially neutral reason" does not suffice "to answer a *Batson* challenge." *Miller-El v. Dretke*, 545 U.S. 231, 239-40 (2005). As Judge Wilson concluded in dissent below, these statements by the trial court judge did not entail "determinations regarding the plausibility of the proffered justifications" and "[t]hus, the Georgia courts rendered a

decision that was 'contrary to, or involved an unreasonable application of, clearly established Federal law.' 28 U.S.C. § 2254(d)(1)." *Hightower v. Terry*, 459 F.3d 1067, 1073 (11th Cir. 2006) (Wilson, J., dissenting).

The majority below, however, wrote that the trial court judge's ***silence*** on whether the prosecutor's stated reasons for prohibiting black juror participation were credible reflected that the trial court "implicitly found the prosecutor's race-neutral explanations to be credible, thereby completing step three of the *Batson* inquiry." *Id.* at 1072 n.9. This procedure was contrary to Batson and its progeny, and to the Eleventh Circuit's recent reaffirmed stance in *Edouard.*

The error is manifest and must be corrected in order to ensure the due process rights guaranteed by *Batson.* If silence were sufficient to rebut "a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.'" *Batson v. Kentucky*, 476 U.S. 79, 98 (1986) (quoting *Norris v. Alabama*, 294 U.S. 587, 598 (1935)).

In dissent, Judge Wilson rejected the majority's suggestion that the trial court judge implicitly addressed step three because "[i]mplicit findings must be reasonable in light of the record evidence." *Hightower*, 459 F. 3d at 1074-75 (Wilson, J., dissenting)(internal quotation omitted). He criticized the majority for failing to "evaluate the record to determine whether its implicit findings are reasonable," and upon his own such evaluation, concluded that "the record fails to support a finding that the prosecutor's reasons were credible." *Id.*

Judge Wilson dissented because, "even more" than *Miller-El II*, this case "compels a finding" that *Batson* was violated. *Id.* at 1072-73. He explained that Miller-El had been required, under the AEDPA, to show by clear and convincing evidence that the state court's factual determinations were unreasonable in light of the evidence before the state. *Id.* at 1073.

> Hightower, on the other hand, does not. In Hightower's case, the trial court merely found that the prosecutor's justifications were "articulable" and "nonrace related" and never touched on the credibility of those statements. The Georgia courts never made factual determinations regarding the plausibility of the proffered justifications because they never applied the final step of *Batson*. Thus, the Georgia courts rendered a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). In light of the Georgia courts' error and of the evidence presented to them, I would grant Hightower's habeas petition.
>
> *Id.*

"The [AEDPA] standard is demanding but not insatiable; as [this Court] said the last time this case was here, '[d]eference does not by definition preclude relief.'" *Miller-El II*, 545 U.S. at 240 (internal citation omitted). Whatever its precise limits, deference does not reach so far as to permit the transformation of silence into implicit findings without consideration of whether those implicit

findings have support in the record. This Court granted certiorari once to mark those limits and should do so again to enforce them.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that the Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted.

Of Counsel:
MARK E. OLIVE
Law Offices of Mark E. Olive
320 West Jefferson Street
Tallahassee, Florida 32301
(850)224-0004

JEFFREY L. ERTEL
Federal Defender Program, Inc.
100 Peachtree Street, N.W.
Suite 200
Atlanta, Georgia 30303
(404) 688-7530

MARK L. WHITAKER
Counsel of Record
Howrey LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800

Counsel for Petitioner
John Washington Hightower

JUNE 8, 2007

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and is restricted to grounds specified in Rule 44.2.

Mark L. Whitaker

Counsel for Petitioner